

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Establish  
Policies and Cost Recovery Mechanisms for  
Generation Procurement and Renewable  
Resource Development.

Rulemaking 01-10-024

**ADMINISTRATIVE LAW JUDGE'S RULING  
RE REVISED PROTECTIVE ORDER**

On April 25, 2002, all parties in this proceeding were served with a draft protective order to govern this proceeding.<sup>1</sup> The draft order was adopted, subject to an opportunity for the parties to review it and identify "major drafting errors" no later than 3 p.m. on April 26, 2002. (April 25 Ruling, p. 8.) Comments on the draft protective order were received by the deadline from each of the respondents in this proceeding, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E).

The comments all raise the same points, although on one issue they interpret the draft protective order quite differently. The purpose of this ruling is to discuss the respondents' comments and to make appropriate changes to the

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<sup>1</sup> Administrative Law Judge's Ruling Concerning Draft Protective Order, issued April 25, 2002 (April 25 Ruling).

draft protective order. A redlined version of the protective order incorporating the approved changes is attached to this ruling.<sup>2</sup>

The first and most important issue raised by the comments is whether Commission Staff -- which is defined in paragraph 3(b) as consisting of the Energy Division and the Office of Ratepayer Advocates (ORA), whether "separately or collectively" -- must sign the Non-Disclosure Certificate attached to the protective order as Appendix A in order to gain access to Protected Materials. On this question, Edison and SDG&E agree that the intent of the protective order is that no Commission employee on the service list (or who otherwise sees Protected Materials) has to sign a Non-Disclosure Certificate, because all Commission employees are subject to the requirements of Public Utilities Code § 583 and General Order 66-C. PG&E, on the other hand, contends that as the protective order is currently written, Commission Staff "would have to request NMPP [Non-Market Participating Party] reviewing party status," that this is a drafting error, and that "ORA employees should be included in the definition of NMPPs" obliged to sign Non-Disclosure Certificates, although employees of the Energy Division would apparently not be subject to this requirement.

On this important question of staff access, Edison and SDG&E are correct, and PG&E is clearly wrong. As the use of non-disclosure agreements and protective orders has become more common at the Commission during recent years, members of the Commission staff have not been required to sign them,

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<sup>2</sup> To conserve resources, Appendices A and B to the protective order are not included here, because no changes for these Appendices have been suggested.

because all Commission employees are subject to § 583 of the Code and General Order 66-C.

The Commission has also stoutly resisted the argument that ORA should enjoy discovery rights no greater than that of any other private party, or should otherwise be treated less advantageously than other Commission staff. As the Commission recently stated in Decision (D.) 01-08-062, where it rejected the argument that ORA could not conduct discovery concerning the New Regulatory Framework audit of Pacific Bell until a new proceeding had been opened:

“ORA's scope of authority [under Pub. Util. Code §§ 309.5 and 314] to request and obtain information from entities regulated by the Commission is as broad as that of any other units of our staff, including the offices of Commissioners. It [is] constrained solely by a statutory provision that provides a mechanism unique to ORA for addressing discovery disputes.” (*Mimeo.* at 6.)

In D.01-08-062, the Commission also stated that under Pub. Util. Code §§ 309.5 and 314, ORA may “undertake audits or investigations, obtain information, and ask questions *at any time* and *for any purpose* related to their scope of work on behalf of the Commission . . .” (*Id.* at 7; emphasis in original.)

Thus, Edison and SDG&E are correct that the right of Commission staff members to gain access to Protected Material is not dependent upon their signing the Non-Disclosure Certificate and agreeing to be bound by the Protective Order. So there will be no dispute about this, however, a sentence has been added to paragraph 1 making clear that staff's access to Protected Materials is not governed by the Protective Order, and thus that no Commission staff member is required to seek NMPP status.

On another issue regarding NMPPs, however, the respondent utilities have made a good suggestion. In their April 26 comments, PG&E, Edison and SDG&E all urge that paragraph 3(g) of the Protective Order should specifically designate

who among the Commission staff is responsible for evaluating, along with the affected utility, candidates proposed as NMPP Reviewing Representatives. I agree with this suggestion, and also with PG&E's point that staff's evaluation of the candidates should be conducted by the Director of the Energy Division, and that ORA should not be involved. Accordingly, the amended protected order attached to this ruling provides that the Director of the Energy Division or his designee will conduct the evaluation of proposed NMPP Reviewing Representatives on the Staff's behalf.

The respondents have also urged that paragraph 8 of the protective order be amended to require that the Commission give them notice in the event that a federal regulatory agency (or a subpoena) requests access to Protected Material. The amended protective order provides that such notice will be given, although the Commission may not necessarily oppose the request (which, in any event, is unlikely to be made under the Public Records Act).

Finally, PG&E, Edison and SDG&E have all asked for clarification on how they are supposed to reconcile the requirements of the electronic service protocols attached as Appendix A to the October 25, 2001 Order Instituting Rulemaking with the requirement in paragraph 14 of the protective order that "all documents containing Protected Material that are filed with the Commission or served on parties to this proceeding shall be placed in sealed envelopes or other appropriate containers . . ."

The language appearing in paragraph 14 has been adapted from prior protective orders, and it can indeed be read as inconsistent with the requirements of the electronic service protocols. However, since the electronic service protocols do not specifically address the situation where confidential material is being served, it seems to us that the following is a workable solution for making the two provisions work in harmony.

If they wish to do so, the utilities (or other serving parties) can electronically serve unredacted versions of documents containing Protected Material on those persons entitled to see them; documents served in this way ought to contain appropriate warnings. If the utility or other serving party is uncomfortable doing this in a particular case, however, we will permit them to serve the unredacted version of the document on persons entitled to see it either by facsimile or by overnight mail. If overnight mail is chosen, all parties must be given 24 hours' electronic notice of the serving party's intention to use this method. If a party objects to service by overnight mail because of the delay it entails, then the serving party must arrange to get a copy of the unredacted version of the document into the hands of the objecting party on the day service is required. In the event overnight mail is used, the assigned ALJ must also be served personally with the unredacted version of the document on the day service is required. Paragraph 14 has been amended to reflect these changes.

Pursuant to the foregoing, **IT IS RULED** that:

1. Paragraphs 1, 3(g), 8 and 14 of the protective order issued in this proceeding on April 25, 2002 are amended to be consistent with the discussion set forth above.
2. The redlined version of the protective order as amended in the manner described in the preceding paragraph is attached to this ruling and is adopted.
3. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E) shall serve an individualized version of the protective order adopted herein, as set forth in Ordering Paragraph 4 of the April 25, 2002 Administrative Law Judge's Ruling Concerning Draft Protective Order, no later than the close of business on Thursday, May 2, 2002. This individualized version shall also be filed in paper

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form with the Docket Office no later than the close of business on Friday, May 3, 2002.

Dated May 1, 2002, at San Francisco, California.

A. KIRK MCKENZIE

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A. Kirk McKenzie  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Re Revised Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated May 1, 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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[Attachment to R0110024 - Revised Protective Order](#)